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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO G. HERNANDEZ, Defendant and Appellant.	F044201 (Super. Ct. No. 03CM7194) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Armando G. Hernandez conspired with several other people to smuggle heroin into Corcoran State Prison (Corcoran), where he was serving a sentence for first degree murder with a prior felony conviction. Defendant was housed at Corcoran's

Substance Abuse Treatment Facility (SATF). He was convicted after jury trial of four counts of conspiracy to bring a controlled substance into a state prison; he admitted two prior strike convictions. (Pen. Code, §§ 182, subd. (a), 667, subd. (b)-(i), 1170.12, subds. (a)-(d), 4573.9; Health & Saf. Code, §§ 11350, subd. (a), 11351, 11352, subd. (b).)[1] Defendant was sentenced to 25 years-to-life imprisonment on count I, to be served consecutive to the sentence that defendant was already serving. The sentence on the remaining three counts was stayed pursuant to section 654. He was ordered to register as a narcotics offender and fines totaling $480 were imposed.

Defendant argues that the trial court erred by failing to modify CALJIC No. 2.20 sua sponte to specifically reference out-of-court statements made by coconspirators during the course of the conspiracy and he contends that his trial attorney was ineffective for failing to request a modified instruction. Defendant also argues that the court improperly refused to appoint new counsel to investigate his claim that his attorney had been ineffective at trial and to prepare a new trial motion on this basis. He challenges the registration requirement as statutorily unauthorized. In supplemental briefing, defendant contends that in *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*) the United States Supreme Court "invalidated a significant portion of California's determinate sentencing scheme," and that, pursuant to *Blakely* and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi)*, the sentencing court exceeded its jurisdiction and prejudicially infringed his federal constitutional jury trial right when it ordered the sentence imposed on count I to run consecutive to his current term. As we will explain, none of these arguments are persuasive. Accordingly, we will affirm.

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

FACTS

During February and March of 2003, Correctional Officer Peter Dean monitored and recorded 16 telephone calls involving defendant or Danny Nieto (Nieto), another inmate housed at the SATF. During these calls, defendant or Nieto spoke with, inter alia, Dorothy Gonzales (Gonzales) and Nieto's sisters, Yvonne and Yvette.[2]

Correctional Officer Dean testified that these telephone conversations contained coded language about a plan for Gonzales to smuggle 14 grams of heroin into the prison during a visit with defendant. Gonzales was to obtain the heroin from Yvonne, who received it from someone known as "Caveman." Officer Dean opined from the contents of these telephone calls that defendant knew that Gonzales was going to smuggle drugs into the prison. He also testified that 14 grams of heroin would be possessed for purpose of sale because it is a large quantity of narcotics. One gram of heroin sells for $300 to $400 in prison.

Just before 6:00 a.m. on March 22, 2003, Gonzales arrived at the Corcoran Amtrak Station as a passenger on the train bound from Bakersfield. Correctional Officer Allen Magnone approached Gonzales and told her she was suspected of smuggling narcotics into the prison. Gonzales initially denied the accusation but subsequently admitted that she had the drugs "up in" her. During a body cavity search at Corcoran, Gonzales removed a condom from her vaginal canal. It contained a pink balloon that enclosed another condom. This condom held 14.11 grams of a dark substance containing heroin.

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[2] Audiotapes of the telephone calls were played for the jury and transcripts were provided. Some of the calls involved multiple parties. The contents of the telephone calls will be set forth as necessary during our discussion of appellate issues.

DISCUSSION

I. Sua sponte modification of CALJIC No. 2.20.

The jury was instructed on credibility and believability of witnesses with CALJIC Nos. 2.20 to 2.27. It was instructed on the law respecting conspiracies and on the limitations placed on the use of coconspirators' statements with CALJIC Nos. 6.10 to 6.14, 6.18, 6.23 and 6.24. CALJIC No. 2.20 instructs the jurors that they are the sole judges of the believability of a witness and lists factors that may be considered in assessing the believability of a witness. Defendant argues that the trial court had a sua sponte obligation to modify this instruction to specifically include out-of-court statements the coconspirators made during their recorded telephone conversations. In a related contention, he argues that his trial counsel was ineffective because he failed to request modification of this instruction. As we will explain, neither argument is persuasive.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Defendant has not cited any authorities holding that CALJIC No. 2.20 is applicable to out-of-court statements, much less to out-of-court statements made by coconspirators during the course of the conspiracy. None of the cases cited by defendant involve CALJIC No. 2.20 or present analogous situations. (*People v. Lawley* (2002) 27 Cal.4th 102, 160-161 [CALJIC Nos. 3.11, 3.12, 3.13]; *People v. Williams* (1997) 16 Cal.4th 635, 682 [CALJIC No. 3.12]; *People v. Andrews* (1989) 49 Cal.3d 200, 215, fn. 11 [CALJIC Nos. 3.11, 3.12, 3.16].) These authorities are not applicable in this context.

We agree with the Attorney General's position that CALJIC No. 6.24 properly instructed the jurors on the relevant principles of law. This instruction directed the jurors not to consider statements made by coconspirators unless they determined several factors by a preponderance of the evidence. These factors adequately ensure the credibility of the coconspirators' out-of-court statements. Since the standard CALJIC instructions given by the court adequately informed the jury of the applicable legal principles, the trial court did not have a sua sponte obligation to modify CALJIC No. 2.20. If defendant wanted further instruction on the topic of credibility and believability of statements made by coconspirators during the course of the conspiracy, he bore the burden of crafting and offering a legally correct instruction on this topic. (See, e.g., *People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489 [instruction on antecedent threats must be requested].)

Furthermore, defendant has not shown that he was prejudiced by the failure to modify CALJIC No. 2.20. The out-of-court statements were casual telephone conversations between family and friends. There was no basis to question their credibility. The fact that the parties were notified at the beginning of each telephone call that it was being monitored did not provide anyone with a motive to falsely implicate defendant. It is not reasonably possible that the jury would have found the defense more credible or returned a more favorable verdict if it had been instructed as defendant urges on appeal. Therefore, even assuming instructional defect, the resulting error was harmless. This determination dooms defendant's ineffective assistance of counsel claim. (*In re Jackson* (1992) 3 Cal.4th 578, 604 [when ineffective assistance claim can be resolved solely on the basis of lack of prejudice, reviewing court need not determine whether counsel's performance was deficient].)

II. Refusal to appoint new counsel.

A. Facts

The jury returned its verdict on September 5, 2003.

On September 25, 2003, defendant sent the court a copy of a letter he had written to his trial counsel. Therein, defendant asked counsel whether he intended to file a new trial motion and stated that he would proceed in propria persona if counsel did not plan to do so.

Defendant's sentencing hearing was scheduled for October 3, 2003. On that date, defense counsel informed the court that defendant had asked him to file a motion for new trial based on ineffectiveness of counsel. Defense counsel suggested that it might be appropriate to appoint another attorney "to take a look at that issue." Defendant personally agreed to waive time and he requested appointment of another attorney to review the motion that he was writing. The trial court refused to appoint new counsel without a "factual basis for a motion … or even a motion pending," but it agreed to continue the sentencing hearing. The court stated that it would "hear all motions relevant to be considered at the time of the sentencing hearing." Sentencing was continued to October 28, 2003.

The parties appeared on this date. The court informed counsel that he had received a letter from defendant. Defense counsel objected to the letter being considered by the court because it sought legal advice. The court replied that it did not intend to give defendant any legal advice. Defense counsel then stated that defendant believes there are grounds supporting a new trial motion and that he does not agree with the defendant. He does not believe that he was ineffective at trial or that there is any other legally valid basis supporting a new trial motion. Defense counsel did not file such a motion because it would have been frivolous. The court decided that it would treat the letter as being in the nature of a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), and would provide defendant with an opportunity "to articulate any issues that he might wish to raise with regard to whether another attorney should be appointed to take over this case, and

that would include the issue of whether or not he has some articulable grounds for a new trial that needs to be perceived by another attorney."

After the courtroom was cleared, the court asked defendant to explain why he thought that his trial counsel had been ineffective and to state the issues that he wanted to raise by way of motion for new trial. Defendant first complained that counsel should have called Nieto as a witness. Defendant said that if Nieto had testified "the jury can hear that [Nieto] was somehow involved in bringing drugs probably or talking about drugs on the phone, but he was not talking about me, okay." Defense counsel responded that he had not called Nieto as a witness because he was uncooperative and he was involved in the conspiracy. His testimony would not have been helpful to the defense. Defendant responded by reading reports prepared by a defense investigator that summarized his pretrial interviews with Nieto. Therein, Nieto denied any involvement in drug use or drug sales and Nieto denied knowing anything about the charges against defendant.

Next, defendant stated that defense counsel should have called Gonzales as a witness. Defendant said that Gonzales would have testified that she intended to go to a motel where she and a female traveling companion had reservations. The drugs were not intended for him, but for boyfriends of the two women. Defense counsel responded that Gonzales's attorney would not allow her to testify and the companion would have "take[n] the Fifth."

Next, defendant complained that the defense should have retained an expert witness to rebut Officer Dean. He would "[attack] … Dean and [show] inconsistencies of Dean's testimony." For example, this expert would testify that women routinely secret drugs in their vagina to avoid detection. Defense counsel replied that no expert would provide the testimony defendant wanted. The court characterized defendant's assertion that people routinely carry heroin in their vagina as bizarre and concluded that "there's

nothing inappropriate about the decision not to find an expert who would be so -- so non-credible as to make that assertion."

Defendant complained that defense counsel should have challenged the admissibility of the telephone calls. Defense counsel stated that he did not know of any legal basis for objecting to their admission.

Next, defendant complained that defense counsel had not presented evidence in his prison packet showing that a confidential informant had tipped correctional officers that defendant was going to deal drugs in the prison. Defense counsel explained that he did not have any information concerning a confidential informant until today and that this evidence would not have served any purpose at trial. The court stated that it did not see how the existence of a confidential informant was material and that proof of this fact would not have affected the validity of the search warrant or otherwise benefited defendant.

Defendant then stated that he would prefer to address these matters in a new trial motion and asked how he could file such a motion "in regards to everything." The court answered that a new trial motion must be filed prior to the sentencing date. "Today is the sentencing date. So a motion is untimely at this point. The issue is whether [defense counsel] should have filed a motion or whether he has been somehow deficient in not doing so. If I can see some indication or some showing that that is the case, then I would substitute him … and appoint another attorney for you to assist you in prosecuting these motions. But thus far I have seen nothing to dissuade me from … concluding that his professional judgment was correct, that the issues you wish to raise were frivolous and … did not warrant the filing of a motion for new trial." The court asked defendant if he had any other substantive points that he felt should have been raised in a new trial motion. The court explained that if defendant could find a nonfrivolous issue that defense counsel

has failed to raise, it would appoint another attorney, continue the sentencing hearing and give the new attorney an opportunity to file a new trial motion.

Defendant complained that Gonzales had been under surveillance during the train ride from Bakersfield to Corcoran and that the officer who conducted this surveillance had not written a report. He had asked defense counsel about this omission and counsel told him that "it was no big deal." Defense counsel explained that the fact Gonzales had been under surveillance during the train trip was disclosed on the eve of trial. The prosecutor did not call this officer because of the late disclosure. Moreover, the officer's testimony would not have been helpful to the defense because "all that [officer] did was surveil somebody riding on the train." Defendant responded, "[T]here had to be some type of a reason why they failed to disclose that report …." The officer who conducted the surveillance might have known that "Gonzales wasn't coming directly to the prison, maybe she was coming directly to the prison, but we will never know that because that officer didn't … even write a report to state this."

Next, defendant complained that defense counsel had not called two officers from the Corcoran Police Department who were present when Gonzales was stopped after exiting the train. Defense counsel replied that he did not call the officers as witnesses because they "didn't have anything to add except what was already in evidence, they don't help us at all."

Defendant complained that defense counsel had not been concerned about the legality of searching Gonzales at Corcoran rather than the train station or the police station. The court replied that it did not see the materiality of this point. Defendant then said that Gonzales had said that she had not been advised of her rights.

When asked if he had anything further, defendant asked to file some unspecified papers that he had brought with him. He asked the court to review this material "before

we even make a decision on this …." The court refused to accept the material and ruled as follows:

> "A motion for a new trial has to be filed in writing and an attorney that files a motion is responsible to make a determination as to whether or not it is a substantive motion or a purely frivolous exercise, and your attorney has indicated to the Court that he was of the opinion that the issues you wish to raise were of a frivolous nature and he did not file a written motion for that reason.
>
> "I have heard nothing yet that would disabuse me of that. I am going to close this hearing and deny your Marsden motion, which as far as the issue of the adequacy of your representation, that's an issue that you can raise in an appeal. It's an issue that you can raise by way of a writ later on, so those issues can still be raised at some later time. But I'm not going to listen to a motion for new trial filed on the date of [sentencing].
>
> "Okay, we'll close this hearing and I'm going to deny your Marsden motion and decline to relieve [defense counsel]…."

Defendant asked whether he could "go pro per then into this situation." The court answered, "We are finished with this situation. We are now at the sentencing, and whether you are pro per or whether you are represented by an attorney my ruling will be the same. I will not entertain a motion for new trial filed on the day of sentencing. It has to be filed in writing prior to the hearing unless there is good cause shown and I have heard none yet offered." Defendant was sentenced immediately thereafter.

B. Analysis

Defendant argues that the trial court erred by failing to appoint new counsel to investigate his allegations of ineffective assistance of counsel for presentation at a new trial motion. He contends that the *Marsden* hearing was insufficient; the court was constitutionally obligated to provide defendant with "the benefit of counsel to investigate and develop the [ineffective assistance of counsel] claims." This contention conflicts with settled law. A criminal defendant does not have a presumptive right to substitution

of counsel or to review of his appointed attorney's performance by a second attorney retained at governmental expense. Rather, a defendant seeking appointment of new counsel to prepare and file a new trial motion based on ineffective assistance of counsel first must make a colorable claim of inadequacy of existing counsel at a hearing convened to explore the reasons underlying the request. (*People v. Stewart (*1985) 171 Cal.App.3d 388, 395-396.) "New counsel must be appointed when the defendant presents a colorable claim that he was ineffectively represented at trial; that is, if he credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings." (*Id*. at p. 397.) The trial court's decision is reviewed under the deferential abuse of discretion standard. (*People v. Earp* (1999) 20 Cal.4th 826, 876.)

The trial court concluded that defendant had not raised a colorable claim that his trial attorney had inadequately represented him and we agree with this determination. Like the trial court, we see no material deficiencies in the representation provided by defense counsel. Defendant did not show that defense counsel failed to present exculpatory evidence or testimony that substantially would have benefited the defense. Defendant also did not show that defense counsel failed to articulate legally valid challenges to the admission of any portion of the People's case. Defendant did not show that defense counsel failed to adequately investigate or prepare for trial. Even in this forum, defendant's appellate attorney can only speculate as to possible ways that investigation of the factual matters raised by defendant might possibly lead to the development of useful information. It is axiomatic that neither side in a criminal trial is required to call as witnesses all those who might have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of the events. (*People v. Stanley* (1967) 67 Cal.2d 812, 820.)

Defendant received an opportunity to explain the reasons why he thought that his current counsel had been ineffective and to explain why he wanted a new attorney appointed to prepare a motion for new trial. The trial court concluded that defendant had not made the showing required to support appointment of new counsel; his complaints were frivolous and did not reasonably support a new trial based on ineffective assistance. This determination is reasonable and has adequate record support. Since defendant had not made a colorable claim that his present attorney was ineffective, the trial court's refusal to appoint different counsel to prepare a new trial motion was not an abuse of discretion.

Defendant's constitutional rights were not infringed when the trial court refused to accept the unspecified paperwork for filing or allow defendant to proceed in propria persona. It had correctly explained to defendant that if he could find a nonfrivolous issue that defense counsel failed to raise, then it would appoint another attorney, continue the sentencing hearing and give the new attorney an opportunity to file a new trial motion. Defendant failed to establish a colorable basis for a new trial motion. He did not meet his burden of proof. Therefore, the trial court was not obligated to accept defendant's untimely papers. Defendant's request to proceed in propria persona was not a genuine attempt to invoke his right to self-representation. Clearly, it was just an expression of frustration with the trial court's refusal to appoint new counsel and a last, desperate attempt to manipulate the trial court into continuing the sentencing hearing and giving him another opportunity to vent his frustrations about trial counsel. Having provided defendant with the hearing to which he was entitled, the trial court did not infringe any of defendant's rights by sentencing him without further delay.

III. Narcotics registration requirement.

Next, defendant contends that the narcotics registration requirement must be stricken because conspiracy to commit a crime listed in subdivision (a) of Health and

Safety Code section 11590 is not an enumerated predicate offense. We are not persuaded by defendant's arguments and we adhere to our previously expressed view that a person like defendant who has been convicted of conspiracy to commit an offense listed in section 11590 may be required to register.

In *People v. Villela* (1994) 25 Cal.App.4th 54 (*Villela*) we rejected this exact argument. *Villela* held that a person who is convicted of conspiracy to commit an offense listed in Health and Safety Code section 11590 properly may be required to register as a narcotics offender. (*Id*. at pp. 60-61.)

Defendant's assertion that this court recently questioned the continuing viability of *Villela* is incorrect. *In re Jorge G.* (2004) 117 Cal.App.4th 931 considered an unrelated question and concluded that appellant's reliance on *Villela* was misplaced because this decision "does not apply here." *(Id*. at p. 944.)

Defendant correctly points out that *Villela* was partially based on the premise that narcotics offender registration is punishment and that our Supreme Court recently rejected this position in an analogous context, concluding that sexual offender registration is a legitimate, nonpunitive regulatory measure. (*In re Alva* (2004) 33 Cal.4th 254, 280.) We agree that *In re Alva* undercuts the persuasive weight of this aspect of *Villela's* reasoning. However, *Villela*'s result is supported on another ground. We also explained:

> "It is also logical that one who is convicted of conspiracy to commit an offense where conviction of the underlying offense would require registration likewise be required to register, for proof of conspiracy requires both the specific intent to agree to conspire and the specific intent to commit the offense which is the subject of the conspiracy. [Citation.] It would be patently absurd to require a person who committed the general intent crime of transporting heroin to register as a narcotics offender while failing to require a person convicted of a crime requiring the formulation of specific intent to transport heroin to register. (See our discussion in *People v. Crowles* (1993) 20 Cal.App.4th 114, 118 [24 Cal.Rptr.2d 377].)" (*Villela, supra,* 25 Cal.App.4th at p. 61.)

This provides an independent basis for *Villela*'s holding that remains viable today.

Villela referenced *People v. Crowles* (1993) 20 Cal.App.4th 114 (*Crowles*), which held "that the Legislature intended to include attempts within the scope of section 11590, and that a person convicted of attempting to commit one of the listed offenses is subject to the registration requirement." (*Id*. at p. 119.) In relevant part, *Crowles* explained that "the Legislature intended to require registration of persons convicted of any one in a broad span of felony drug offenses." (*Id*. at p. 118.) If one reads section 11590 literally, "persons convicted of attempting a serious drug offense [such as attempting to sell narcotics to a minor on school grounds during school hours] would not be required to register while those convicted of a completed, but less serious offense [such as simple possession], must register.… Such a person's culpability is certainly as great as that of someone convicted of simple possession …. And the public interest in requiring registration by the former is even clearer than in the case of the latter." (*Crowles, supra*, 20 Cal.App.4th at p. 118.)

We remain convinced that it would be patently absurd and contrary to the legislative intent apparent in the statute to exclude from the registration requirement persons like defendant who have been convicted of conspiracy to commit an offense listed in Health and Safety Code section 11590. As explained in *Villela, supra*, 25 Cal.App.4th at page 118, persons convicted of conspiracy to commit a narcotics offense have both the specific intent to agree to conspire and the specific intent to commit the substantive offense. Furthermore, exclusion of such persons would result in the untenable situation described in *Crowles*, *supra*, 20 Cal.App.4th at page 118, namely those convicted of conspiring to commit a serious drug offense would not be required to register while those convicted of a completed but less serious offense would be subject to the registration requirement. Thus, the registration requirement stands.

IV. Fines.

In his opening brief, defendant challenged some of the fines imposed by the court. However, in his reply brief defendant writes that he has "reconsidered the basis for this claim" as a result of *In re Alva, supra*, 33 Cal.4th 254, and that he "withdraws" the challenge. Therefore, appellate resolution of this point is unnecessary.

V. Blakely issues.

In *Apprendi, supra*, 530 U.S. 466, a narrow five justice majority of the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) In *Blakely,* the same five justices voted in favor of extending *Apprendi* to apply to the imposition of an "exceptional" sentence under Washington State law. Justice Scalia's majority opinion held that the trial court had violated defendant's Sixth Amendment jury trial right by sentencing him to a 90-month "exceptional" sentence, which is 37 months beyond the crime's "standard range" of 49 to 53 months. He reasoned that 53 months is "the 'statutory maximum' for *Apprendi* purposes" because this "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2537] emphasis in original.) Since the jury had not found beyond a reasonable doubt the ground upon which the judge based the "exceptional" sentence, defendant's Sixth Amendment trial right had been infringed.

The United States Supreme Court will decide *Blakely*'s effect on the federal sentencing guidelines in two cases pending this term: *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105. Similarly, *Blakely*'s effect on California's determinate sentencing law currently is pending in our Supreme Court. In *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July

28, 2004, S12612, our high court will decide what effect *Blakely* has on the validity of judicial selection of the upper term and on imposition of consecutive sentences. The positions we have adopted regarding the *Blakely* issues presented in this case necessarily are tentative and subject to modification after decisions are issued in these pending cases.

Defendant contends that imposition of consecutive sentences is violative of *Blakely* and *Apprendi.*[3] First, we must address defendant's assertion that *Blakely* "invalidated a significant portion of California's determinate sentencing scheme." We believe that California's determinate sentencing is entirely consistent with the holdings of *Apprendi* and *Blakely* and we concur with the cogent dissent authored by Justice Benke of the Court of Appeal, Fourth District, Division One, in *People v. Lemus* (2004) 122 Cal.App.4th 614. She explained that *Blakely* had identified a trial court's ability to exercise discretion based on facts not found by jury to impose a sentence that exceeded the range set by statute for the offense as the fatal defect in Washington's sentencing law. California's determinate sentencing scheme is not analogous with the defective Washington system. In California, a range of sentences is set by statute. Enhancements elevating the sentence beyond this statutory range must be separately pled and must be found true by a jury or be admitted by the defendant. The trial court does not have discretion to sentence individuals outside the range of sentences set by statute or to impose enhancements that have not been found true by a jury or admitted by the defendant. "The court in *Blakely* had no complaint with sentencing ranges for offenses, and it readily accepted the constitutional propriety of indeterminate sentencing schemes. If a constitutionally proper sentence for a crime can be a range, then necessarily some institution other than the jury must determine the sentence within that range…. The determination of culpability within a statutory range is a task for which juries generally

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[3] The Attorney General did not file a response to defendant's supplemental brief or otherwise address the *Blakely* issues raised by defendant.

are not well suited and is traditionally given to the court." (*Id*. at p. 623.) California's sentencing law does not permit "imposition of a term greater than the range authorized by law for the offense … based on a fact not found by a jury or admitted by the defendant," which is the constitutional defect the *Blakely* majority found in Washington's sentencing scheme. (*Id*. at p. 625.) The presumption in favor of the middle term is not significant because "[i]n any noncapricious sentencing system based on an authorized range, the middle of the range is for average culpability, the lower for the less culpable and the upper for the most culpable. Our determinate system is merely more formal than many in that it requires a finding and stating of particular reasons for imposing the upper or lower term." (*Id*. at p. 624.) Thus, California's sentencing law does not infringe defendants' federal jury trial right, as this constitutional protection is interpreted by the majority of the United States Supreme Court in *Apprendi* and *Blakely*.

In light of our agreement with Justice Benke, our opinion respecting the constitutionality of vesting judges with the discretion to impose consecutive sentences is a foregone conclusion. Nevertheless, we will explain why defendant's contention that *Blakely* created a jury trial right to the factors upon which a consecutive sentencing decision is based cannot withstand scrutiny, irrespective of the constitutionality of other aspects of California's determinate sentencing law.

First, in this case the decision to run defendant's sentence consecutive to the term he already was serving was not a discretionary judicial determination. As a result of defendant's admission of the prior strike allegations, consecutive sentencing was mandatory pursuant to section 1171, subdivision (a)(8). The amended information specially alleged that defendant had suffered two prior strike convictions for serious or violent felonies, in violation of section 1170.12, subdivisions (a) through (d) and section 667, (b) though (i), for a 1997 murder conviction and a 1990 assault with a firearm conviction. Defendant admitted the truth of these special allegations on September 4,

2003. Subdivision (a)(8) of section 1170.12 provides: "Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law." Thus, the trial court did not exercise discretion in determining whether to impose consecutive sentences based on a factor that was not decided by the jury or admitted by defendant. Defendant admitted the truth of the prior strike allegations and, as a result, consecutive sentencing was statutorily mandated. Since the consecutive sentence was not discretionary and did not rest upon a judicial factual determination, it does not contravene *Blakely* under any reasonable interpretation of the decision.

Second, we agree with the reasoning and result of published authorities unanimously holding that *Blakely* did not create a jury trial right concerning the facts supporting a discretionary judicial decision to impose consecutive sentences. (*People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1370-1372; *People v. Sample* (2004) 122 Cal.App.4th 206, 225-227; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565-1567, review granted Nov. 17, 2004, S128417; *People v. Vonner* (2004) 121 Cal.App.4th 801, 810-811, review granted Oct. 20, 2004, S127824; *People v. Sykes* (2004) 120 Cal.App.4th 1331, 1341-1345, review granted Oct. 20, 2004, S127529.) These decisions explain that when a person is convicted of two or more offenses, the trial court has the discretion to impose the sentence on the subordinate counts consecutively or concurrently, unless there is a superceding statutory mandate such as section 1170.12, subdivision (a)(8). If the court fails to specify whether a particular subordinate sentence is consecutive or concurrent, the sentence will run concurrently. (§ 669.) However, section 669 neither creates a statutory presumption in favor of concurrent sentencing nor vests the defendant with an entitlement to a concurrent sentence. (*People v. Sample, supra*, 122 Cal.App.4th at p. 227; *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) While a defendant has "the right to the exercise of the trial court's discretion, the person

does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, 'that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.'" (*People v. Sample, supra*, 122 Cal.App.4th at p. 227.) "Although our laws permit the trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence -- not an enhancement." (*People v. Vaughn, supra*, 122 Cal.App.4th at p. 1372.) Thus, "imposition of consecutive sentences does not exceed the statutory maximum penalty for those offenses and thus does not contravene the holding in *Blakely*." (*People v. Ochoa, supra,* 121 Cal.App.4th at p. 1567.) Furthermore, "[b]oth *Blakely* and *Apprendi* involve a conviction for a single count. The historical and jurisprudential basis for the *Blakely* and *Apprendi* holdings did not involve consecutive sentencing." (*People v. Sykes, supra*, 120 Cal.App.4th at p. 1344.)

DISPOSITION

The judgment is affirmed.

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Levy, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Harris, J.